Supreme Court, U.S.
FILED
SEP 23 2003
OFFICE OF THE CLERK

No. 03 458

# In the Supreme Court of the United States

WAYNE WHITTAKER,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

## PETITION FOR WRIT OF CERTIORARI

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September 2003

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

64 pp

## QUESTIONS FOR REVIEW

1. Did the United States Court of Appeals for the Third Circuit err in finding evidence to be sufficient by utilizing speculation and by further utilizing negative inferences from statement of the Defendant that there could have been additional telephone conversations with individuals who were alleged to have taken motor vehicles, even though there was no evidence of such conversations? Did the Third Circuit Court of Appeals violate fundamental due process and decisions of the United States Supreme Court in allowing the drawing of negative inferences to be used as substantive evidence to convict a criminal defendant from his testimony, particularly when the negative inferences involve speculation?

2. Whether the use of Mr. Whittaker's statement violated the corpus delicti rule?

## LIST OF PARTIES TO THE PROCEEDING

Petitioner is Wayne Whittaker.

Respondent is the United States government.

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1. Order of the United States Court of Appeals for the Third Circuit dated June 26, 2003 denying the Petition for Rehearing

2. Opinion of the United States Court of Appeals for the Third Circuit dated May 20, 2003

3. Memorandum and Order dated December 7, 2001 of the Honorable Stewart Dalzell of the United States District Court for the Eastern District of Pennsylvania

## BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The Due Process Clause under the Fifth Amendment of the United States Constitution.

## STATEMENT OF THE CASE

The Petitioner, Wayne Whittaker, was indicted on one count of mail fraud (18 U.S.C.A. 1341) arising out of the theft of his motor vehicle. Mr. Whittaker was alleged to have submitted a claim to his insurance company for reimbursement of the loss due to the theft when it was alleged that he had arranged to have his car stolen. Mr. Whittaker vigorously denied the allegations and testified during his trial.

At all pertinent times present counsel, Samuel C. Stretton, Esquire, represented Wayne Whittaker. Samuel C. Stretton was initially privately retained by Mr. Whittaker for trial purposes. The Honorable Stewart Dalzell subsequently appointed Mr. Stretton to represent Mr. Whittaker through the appellate process. The United States Attorney's Office was represented by Assistant United States Attorney Mark S. Miller. Assistant United States Attorney Robert Zauzmer represented the government during the pretrial appeal to the United States Court of Appeals for the Third Circuit.

The case was assigned to the Honorable Stewart Dalzell. The indictment was filed on February 22, 2001. Pretrial motions were held before Judge Dalzell on May 24, 2001 involving the suppression of the statement of Mr. Whittaker, and the Motion to Disqualify the United States Attorney's Office and/or Dismiss the Case based on allegations of misconduct.

On June 12, 2001, Judge Dalzell filed an Order disqualifying the United States Attorney's Office. The United States Attorney's Office requested reconsideration, which was denied by Judge Dalzell on July 11, 2002. The United States Attorney's Office then filed an appeal on July 12, 2001 to the United States Court of Appeals for the Third Circuit. That earlier appeal was docketed at the Third Circuit Docket Number 01-2874. The matter was argued before a panel of judges of the United States Court of Appeals for the Third Circuit on September 25, 2001. Subsequently, an Opinion and Order was returned reversing the disqualification of the United States Attorney's Office and remanding the case for trial. That decision is found at *United States vs. Wayne Whittaker*, 268 F.3d 185 (3rd Cir., 2001).

A trial with a jury was held before the Honorable Stewart Dalzell beginning on November 13, 2001. The trial continued on November 14, 2001 and November 15, 2001 and resulted in a jury verdict on November 16, 2001. The jury verdict on the one count of mail fraud was guilty.

After the jury verdict, present counsel immediately moved for a Judgment of Acquittal and extensive argument was held on that motion. Judge Dalzell very reluctantly denied the Motion for Judgment of Acquittal.

Subsequently present counsel filed a Motion for Reconsideration of the Judgment of Acquittal. Judge Dalzell, by Memorandum dated December 7, 2002, which is attached as part of the appendix, although noting this was on the "razor's edge", again denied the Motion for Reconsideration of the denial of the Judgment of Acquittal.

Mr. Whittaker was sentenced on March 5, 2002 by Judge Dalzell to five years probation, six months of home detention with electronic monitoring and restitution in the amount of $25,664.50 to G.E. Auto Insurance and restitution in the amount of $878.89 to World Omni Financial Corporation. Judge Dalzell also established a restitution schedule.

A timely Notice of Appeal was filed to the United States Court of Appeals for the Third Circuit on March 8, 2002.

A briefing schedule was established with the Appellant's, Mr. Whittaker's, Brief due on or about July 17, 2002. Present counsel asked for an extension, which was granted by the United States Court of Appeals for the Third Circuit until July 26, 2002 since present counsel had several jury trials he was involved in during the month of July.

Oral argument was held in the Third Circuit and by Memorandum Opinion dated May 20, 2003. The judgment of the sentence was affirmed. Petition for Re-Hearing En-Banc was filed and was denied on June 26, 2003.

The Petitioner, Wayne Whittaker, was convicted of one count of mail fraud (18 U.S.C.A. 1341). Mr. Whittaker vigorously denied his guilt and asserted his innocence during his testimony. The conviction was essentially based on the fact that Mr. Whittaker had been telephoned by an anonymous caller on two occasions about taking Mr. Whittaker's car. Approximately one to two months later, Mr. Whittaker's car was stolen. But Mr. Whittaker contended he never agreed to the theft and told the unknown individual he had second thoughts. Mr. Whittaker testified that his car was stolen without his knowledge or consent and he validly submitted the claim for the loss to the insurance company.

A review of the evidence is now necessary. It should be noted that a large portion of this case involved chop shops and the stealing of cars. The government conceded Mr. Whittaker was not involved and had no knowledge of the chop shops and the unrelated car thefts. The first government witness was F.B.I. Agent Joseph Majorowitz (A-57). Agent Majorowitz told the jury a TASK Force had been established in the 1990's to investigate car thefts in Philadelphia (A-58, A-59). He indicated during the investigation a secret location where the chop shop was maintained in the Port Richmond section of the City was discovered (A-60). Agent Majorowitz testified that location was called the "Hacienda" (A-60).

Agent Majorowitz indicated that an individual by the name of Billy Stauffer began to work as a confidential informant during this time with the F.B.I. (A-60).

Agent Majorowitz indicated Mr. Stauffer was given very specific instructions (A-65). Mr. Stauffer was allowed to transport stolen cars once they were stolen and dropped off at the chop shop (A-66). He was also allowed to disassemble vehicles that were called "insurance give-ups" (A-66). Mr. Stauffer was to report back to the agents every night and he was to provide identification for each car, such as insurance cards or registration cards, or VIN numbers, etc. (A-66).

Agent Majorowitz indicated as part of the investigation, the vehicle of Wayne Whittaker was identified through the Mylar sticker that came off the door of the JEEP Cherokee that was leased by Mr. Whittaker (A-68).

During cross examination Agent Majorowitz admitted Mr. Stauffer was told things would go much better if he had cooperated with the government (A-70).

Frank Ozga was the next government witness (A-77). Mr. Ozga admitted he was indicted in September of 1999 on various criminal charges arising out of running a chop shop (A-78 – A-81). He testified that his reason for cooperating presently with the government was to help himself and achieve a better deal on his sentence (A-81).

Mr. Ozga testified he ran a business called A-OK Auto Parts at 2500 Orthodox Street in Philadelphia (A-82, A-83). He also ran another business called Frankford Auto Salvage (A-83). Mr. Ozga stated during the course of his running these chop shops he opened up a business at 2900 Ontario Street in Philadelphia, which was identified as the "Hacienda" (A-84). He indicated the "Hacienda" was where stolen cars were taken to be chopped up (A-84, A-85). He testified he had people working for him, including his stepson, Michael Dyke and Billy Stauffer (A-85).

Mr. Ozga indicated he would order cars to be taken by car thieves to be brought in (A-87, A-88).

Mr. Ozga also testified that cars were brought in by people who wanted to collect insurance money (A-89). He indicated these cars would normally be in good condition (A-89). He distinguished those cars from cars that were stolen because stolen cars normally had damage to the steering column or other damage (A-89, A-90). Mr. Ozga indicated the insurance give-up cars normally had keys (A-91). He indicated insurance give-up cars would not normally be chopped up right away, but often times would be driven around by his people (A-91, A-92).

Mr. Ozga stated in the summer of 1999 a Leonard Dewolfson, Sr., discussed with him a JEEP Cherokee, which was actually brought in to Mr. Ozga by Mr. Dewolfson's son, Leonard Dewolfson, Jr. (A-93, A-94). He indicated when the black JEEP Cherokee was dropped off, it had "junk wheels on it." (A-94, A-95). Mr. Ozga testified he paid the Dewolfson's $300.00 for the black JEEP Cherokee (A-96). On cross-examination Mr. Ozga was confronted with the federal guidelines, which called for an excess of 12 to 15 years of incarceration (A-98). He also admitted he had problems with unpaid taxes (A-100). Mr. Ozga stated Billy Stauffer had worked for him for 4 years before he became a government witness (A-102). Mr. Ozga also admitted at present he had not been charged in the state system with car theft (A-103).

Mr. Ozga indicated in 1999, particularly in June and July of 1999, Mr. Stauffer was not working for him every day (A-107).

Mr. Ozga was unable to give a date in 1999 when he received a black JEEP Cherokee (A-110). Mr. Ozga was unable to say whether Mr. Stauffer was present when that vehicle was brought in (A-110, A-111). He indicated the black JEEP Cherokee had the small wheels on it, not the normal full sized wheels (A-112). He admitted that someone else had taken the wheels before the car got to him (A-113).

A defense witness was then taken out of turn, Charlotte Parrish (A-114). She indicated she was an environmental specialist for the United States Post Office (A-115). She indicated she knew people in the community who knew Wayne Whittaker and his reputation in the community among those people for peacefulness and law abidingness and truthfulness and honesty was excellent (A-116). She also indicated in the summer of 1999, shortly after Mr. Whittaker's car was stolen, she telephoned Mr. Whittaker and said she saw a car like his being driven (A-116). She indicated she saw the car around Fifth and Market Streets in Philadelphia (A-117).

The cross-examination of Mr. Ozga resumed the next morning (A-146). Mr. Ozga indicated he did not know the Appellant, Wayne Whittaker and had never spoken with him (A-147). Mr. Ozga also admitted that cars could be started with keys or without keys (A-148). He admitted a good car thief could steal a car without doing damage to the car (A-148). Although Mr. Ozga indicated that he had keys to the JEEP, he was confronted with his prior statement where nothing was noted about him having keys to the JEEP (A-148, A-151 – A-153).

On redirect examination, Mr. Ozga indicated his instructions to people who gave up their vehicles for

insurance purposes was to give them to him three days before they reported the car stolen (A-155, A-156).

The government then called Michael Dyke (A-164). Mr. Dyke also had pled guilty to the charges arising out of the chop shop operation and was similarly expecting a benefit for his testimony (A-165 – A-167). He indicated that not only were stolen cars brought into the chop shops, but insurance give-up cars were also brought in. He noted insurance give-up cars normally did not have damage to the steering or the doors (A-170). He indicated he did business with the Dewolfson's in terms of getting auto parts (A-174). He described the chop shop operation and the people who were part of it (A-170 – A-175). He indicated the Dewolfson's turned over to his stepfather, Mr. Ozga, a black JEEP Cherokee (A-175). He indicated the Cherokee had black wheels on it and didn't have the wheels that normally come with a Cherokee (A-175). He indicated the Dewolfson's brought the car in with the keys (A-176). He indicated the Dewolfson's were paid several hundred dollars (A-177). Mr. Dyke indicated the JEEP Cherokee was then taken down to the "Hacienda" (A-177). He indicated that the wheels were very wobbly when he drove the car (A-78). He indicated the car was to be chopped up and the parts sold (A-178). On cross-examination Mr. Dyke indicated he did not know Mr. Whittaker and had never spoken to him (A-85). Although indicted in September of 1999, he indicated he did not begin cooperating until January of 2001 (A-185). Mr. Dyke was confronted with the fact that his grand jury testimony did not contain references to the JEEP Cherokee (A-188 – A-190). Mr. Dyke indicated he did not recall seeing Billy Stauffer with the black JEEP Cherokee (A-191). Mr. Dyke also indicated as part of his deal with the government he would not be charged in the Pennsylvania state system with car theft (A-193).

William Stauffer was then called by the government (A-200). Mr. Stauffer had entered a guilty plea to charges arising out of a chop shop, and also agreed he was cooperating with the government (A-201, A-202). He began working with Mr. Ozga in 1994 (A-203). He indicated he job was to chop up cars (A-205). Mr. Stauffer indicated he was initially paid $50.00 a day, and later received $100.00 per day (A-206).

Mr. Stauffer testified at some point he began to cooperate with the Federal Bureau of Investigation (A-212, A-213). He stated he would get the VIN number or some identification from the car and give it to the federal agents (A-214, A-215).

Mr. Stauffer indicated in the summer of 1999 he saw a black JEEP Cherokee (A-219). He testified the JEEP Cherokee was at the garage at the "Hacienda" (A-219, A-220). Mr. Stauffer indicated he started the vehicle since the keys were in the ignition (A-220). He indicated he did not see any damage to the vehicle (A-220). He indicated he moved the black JEEP Cherokee in the garage (A-220 – A-222). Mr. Stauffer testified he removed a sticker from the door and identified the sticker he had removed as government's exhibit number 5 (A-222). He indicated that the JEEP Cherokee did not have good wheels (A-223).

Mr. Stauffer stated he gave the sticker to Agent Duffy at a later time (A-224). He indicated he did not know Wayne Whittaker (A-225). On cross-examination, Mr. Stauffer's prior record was reviewed (A-229 – A-232). He indicated he was present when numerous cars where stolen, but said he didn't steal cars (A-232, A-233). He agreed that he only received one-year probation for his misconduct (A-236). Mr. Stauffer was confronted with his grand jury testimony, which contained nothing about him driving a black JEEP Cherokee

(A-238 – A-241). Mr. Stauffer indicated he never wrote any of the information down to give to Agent Duffy, but just kept it in his head (A-242). Mr. Stauffer indicated he saw the vehicle on a Friday in 1999 and gave the information on the following Monday to the agent (A-242, A-243). Mr. Stauffer was confronted with a statement given to Agent Duffy that was dated June 16, 1999 concerning Monday, June 14, 1999 (A-252).

F.B.I. Agent Thomas Duffy then testified (A-266). Agent Duffy confirmed that he worked with Billy Stauffer when Mr. Stauffer was cooperating in 1999 (A-267). He indicated on June 14, 1999, Mr. Stauffer met with him and provided him a sticker from a JEEP Cherokee that had been at the "Hacienda" (A-269). Agent Duffy indicated he ran the sticker and the sticker came back to a vehicle that was leased by Wayne Whittaker (A-271). He indicated the actual entity which owned the car was World Omni (A-241). Agent Duffy testified the report of the stolen vehicle indicated the car had been stolen on June 6, 1999 from Third and Queen Street in Philadelphia (A-274, A-275). Agent Duffy indicated he never advised Mr. Whittaker that the JEEP had been found (A-283). He further stated he never advised the insurance company the JEEP had been found (A-283, A-284). He also testified he took no steps to notify the Philadelphia Police Department (A-284). Agent Duffy also indicated that World Omni and the insurance company were never notified the car was found even though insurance payments were being made (A-285, A-286). Agent Duffy was confronted with the fact that the individuals were indicted in August and September of 1999 before the September 10, 1999 mailing date alleged in Mr. Whittaker's indictment (A-286). He again indicated he took no steps to notify the insurance company concerning the fact the car had been found and/or chopped up (A-286). Agent Duffy also indicated at the time the car had been given up by

Mr. Stauffer there was a question as to whether it was really an insurance give-up or a legitimately stolen car (A-234).

Police Officer Samuel Rivera from the Philadelphia Police Department testified (A-292). On June 6, 1999, Officer Rivera met with Wayne Whittaker, who filled out a stolen car report with him (A-293 – A-295). The report was filled out on Sunday, June 6, 1999 and the car was stolen as of June 4, 1999 (A-295). Officer Rivera indicated the car stolen was a black 1998 JEEP Cherokee (A-296). He indicated Mr. Whittaker provided him the insurance information from Colonial Penn Insurance Company (A-297). Officer Rivera indicated Mr. Whittaker told him the vehicle was locked when he last saw it on June 4, 1999 (A-298). He indicated Mr. Whittaker told him there was no arrearage or outstanding money on his car (A-299). He also indicated he did not see any broken glass in the area where the car had been left (A-248). Officer Rivera stated that Mr. Whittaker did not say anything to him about a conversation with another individual about the car (A-302).

On cross-examination, Officer Rivera indicated he did not have any real recollection of this report other than from looking at the report (A-304, A-305). He indicated the actual time the car was reported stolen was at 8:50 p.m. on June 6, 1999 (A-306). Officer Rivera indicated the car could have been taken anytime between June 4th and June 6th (A-306). Officer Rivera indicated he had no recollection of what Mr. Whittaker said about the car being in arrears or not, and was only relying on the computer report that someone inputted eight hours later (A-309).

There was a stipulation then as to the business records of Colonial Penn Insurance and Home Insurance Company (A-312). Ms. Shank from G.E. Auto Insurance then testified (A-

313). She indicated her company was previously known as Colonial Penn Insurance Company (A-313). She indicated in June of 1999 her company had an automobile policy with Mr. Whittaker (A-316). She indicated Mr. Whittaker provided her company with an Affidavit for vehicle theft (A-319). Ms. Shank testified Mr. Whittaker, on June 7, 1999, had called in the vehicle theft (A-324, A-325). She indicated Mr. Whittaker advised her he left the car parked in front of his office on Queen Street, between Second and Third Streets in Philadelphia on Friday, June 4, 1999 at 12:00 noon and when he returned on Sunday, June 6, 1991 at 8:30, the car was missing (A-326). The report stated Mr. Whittaker indicated his car had been locked and the alarm was on as well as a CLUB in place (A-327). Ms. Shank indicated the company actually paid off $25,664.50 on behalf of Mr. Whittaker (A-328 - A-30). She indicated the Colonial Penn check was actually sent to the leasing company World Omni in settlement of the claim and was sent through the United States Mail on July 27, 1999, not the September 10, 1999 date alleged in the indictment (A-329, A-330).

On cross-examination, Ms. Shank admitted she did not know she was speaking to Wayne Whittaker because she had never met him before (A-334, A-335). Ms. Shank agreed Mr. Whittaker had advised her he was two months in arrears and gave her all the pertinent information concerning the car (A-339). She indicated Mr. Whittaker advised her the keys were in his possession (A-342). She indicated Mr. Whittaker also advised her his car had been rear-ended several days before it was stolen and the accident was caused by a Mrs. Pepper from the Philadelphia Horticultural Society (A-348). Ms. Shank agreed Mr. Whittaker gave the location and date of the collision on June 2, 1999 (A-349). She also indicated he advised her that he had taken the car to a body shop on June 3, 1999 (A-349). He advised her he had been given an

estimate of $1,300.00 (A-349). Ms. Shank also agreed that Mr. Whittaker gave her permission to talk to World Omni to arrange the payment (A-351). She indicated despite the payment figure, Mr. Whittaker still owed the leasing company about $3,000.00 (A-353). She indicated she settled the insurance claim without Mr. Whittaker's consent for the amount of $25,664.00 even though she knew he would still owe several thousand dollars (A-353).

Darla McCabe, from World Omni Financial Corporation testified (A-357, A-358). She confirmed her company leased the 1998 JEEP Grand Cherokee to Mr. Whittaker (A-359 – A-362). She indicated Mr. Whittaker total monthly payment was $499.57 (A-366). She then went through telephone calls she had with Mr. Whittaker in the months before June of 1999 (A-370 – A-375). There was a stipulation then between March of 1999 through June of 1999 there were contacts between Wayne Whittaker and the leasing company (A-389). The stipulation indicated as of June 4, 1999, the account was two months in arrears (A-389). The stipulation further indicated on dates in April and May of 1999, Mr. Whittaker had discussions with representatives of World Omni as to a voluntary surrender of the motor vehicle and the other options available to him (A-389). There was a further stipulation that on June 4, 1999, there was conversation between a representative from World Omni and Mr. Whittaker where he indicated he would be sending $600.00 on Friday, June 4th (A-389).

Ms. McCabe indicated the $600.00 mentioned during the June 4th conversation was never received by World Omni (A-389). On cross-examination Ms. McCabe indicated during the May 1999 conversation, Mr. Whittaker advised her company that he had just changed jobs and was getting himself back together financially (A-394).

Special Agent Jennifer Usleber of the Federal Bureau of Investigation then testified (A-395). She indicated that she was conducting interviews as to the stolen cars and interviewed Mr. Whittaker initially as a victim on May 10, 2000 (A-398) (See Exhibit "D" to the Brief). She indicated she met Mr. Whittaker at the F.B.I. Office in Philadelphia (A-399). During Agent Usleber's testimony there were continuing objections on the corpus delicti issue concerning the statement that had been raised at the pretrial and at the beginning of the trial (A-404 – A-406). She indicated Mr. Whittaker provided her information about the stolen car. Agent Usleber then advised Mr. Whittaker that she had a source inside who told her the car had been an insurance give-up (A-406). Again there were objections about corpus delicti (A-408). Agent Usleber indicated Mr. Whittaker told her that he had a conversation with an unknown caller who told Mr. Whittaker he understood Mr. Whittaker had something to get rid of (A-409). Mr. Whittaker told her the person said they could make the car disappear (A-410). She indicated Mr. Whittaker told the person he was uncertain what he wanted to do, but gave the caller a description of the vehicle and where it would be parked (A-411). Agent Usleber indicated Mr. Whittaker told her the person said it could be done within a couple of weeks (A-411). She indicated Mr. Whittaker told her that he thought the car would disappear and he would be able to get out of the loan (A-412). She indicated Mr. Whittaker advised her the person called him a second time a few days later and said, "We can get rid of your car and it can all be taken car of in a couple weeks." (A-412, A-413). She indicated Mr. Whittaker said he did not say anything to the person (A-415). Agent Usleber indicated Mr. Whittaker told her he felt guilty and sick to his stomach after the second conversation (A-415, A-416). She stated that Mr. Whittaker told her he did not tell the Philadelphia Police Officers about these phone calls when he reported the car stolen (A-416).

She indicated Mr. Whittaker did tell her he had told the insurance investigator about the accident with the car several days before (A-416, A-417). Agent Usleber indicated after she had confronted Mr. Whittaker he was crying and upset (A-417). She indicated Mr. Whittaker said he felt better getting it off his shoulders (A-418). The agent during cross-examination was vigorously cross-examined with her written report concerning Mr. Whittaker's statement. That report did not reference all the information she testified about and did not include the interruptions in the conversation as she alleged in her direct testimony (A-423 – A-426).

Agent Usleber agreed Mr. Whittaker said he had second thoughts during the second conversation with the caller and told the individual he was not sure what he wanted to do (A-428). She indicated that according to her notes, Mr. Whittaker said during the second conversation, "I don't want to do this." (A-429). She stated that Mr. Whittaker then indicated the person hung up (A-429). The agent admitted there was nothing in her report reflecting that Mr. Whittaker said he took any steps to avoid having the car being taken (A-430). Agent Usleber was confronted with her grand jury testimony where she only mentioned the first conversation Mr. Whittaker had with the person and did not mention anything about the second conversation and his change of heart (A-432 – A-435).

A defense witness, Roy Whittaker, was allowed to be taken out of turn (A-435). He indicated he was the brother of Wayne Whittaker (A-436). Roy Whittaker gave his opinion among people in the community and his own personal opinion that Mr. Whittaker was a peaceful, law-abiding and truthful and honest person (A-436).

Rose Quinn was then also taken out of turn as a defense witness (A-440). She testified she was the reporter for the Delaware County Times for police and court activities in Delaware County (A-440). She indicated that her brother was a close friend of Wayne Whittaker and she testified to Mr. Whittaker's excellent reputation as a peaceful and law abiding and truthful and honest person (A-441).

Another defense witness was taken out of turn, Charles Baker, the owner of Warwick Cleaners and Dry Cleaning in Philadelphia at 22nd and Spruce Street (A-451). He indicated he had known Mr. Whittaker for many years and testified as to Mr. Whittaker's excellent reputation as a truthful and honest and peaceful and law abiding character (A-452). Mr. Baker indicated that the weekend of June 4th through June 6th of 1999, he was with Mr. Whittaker and Bill Quinn in Wildwood, New Jersey (A-453).

Agent Usleber's testimony was then resumed (A-4464). She admitted she told the grand jury the telephone call from the unidentified man occurred in April of 1999 (A-465). She agreed she never told the grand jury about the second conversation (A-466). Agent Usleber testified she didn't think it would be of value to the grand jury to tell them that Mr. Whittaker said he had second thoughts because he didn't do anything about it (A-469). She also indicated before Mr. Whittaker told her about the two conversations, she had spent approximately ten minutes telling him about the value of cooperating (A-475, A-476a). The agent agreed there was nothing about a date or a time or location when and where the car was supposed to be taken in the statements (A-498). She indicated that Mr. Whittaker referred to the conversation as occurring in April of 1999 (A-498, A-499).

Special Agent James McIntosh of the Federal Bureau of Investigation then testified (A-499). He was present during the interview with Mr. Whittaker (A-500). He indicated that he did not make any corrections to the F.B.I. statement that his colleague prepared and he had read the statement (A-505 – A-509).

The government then rested (A-535, A-536).

The next defense witness was William Quinn, who was a Branch Manager for First Union National Bank (A-537). He indicated he resided with Mr. Whittaker (A-537-A-538). Mr. Quinn testified that in early June of 1999 he and Mr. Whittaker went to Wildwood, New Jersey for the weekend (A-538). Mr. Quinn indicated he and Mr. Whittaker drove down to New Jersey in Mr. Quinn's car (A-539). He indicated he saw Mr. Whittaker's JEEP Cherokee prior to leaving for Wildwood, New Jersey (A-539). Mr. Quinn confirmed Mr. Whittaker had an accident in the JEEP Cherokee in early June of 1999 (A-540). Mr. Quinn indicated he had observed damage to the rear bumper (A-541). On June 4, 1999, Mr. Quinn confirmed Mr. Whittaker parked the vehicle on Queen Street (A-541). Mr. Quinn confirmed that the vehicle was locked and there were no keys in the car (A-542). Mr. Quinn confirmed that both he and Mr. Whittaker had keys to the car (A-542). Mr. Quinn confirmed that the car also had a CLUB on it (A-542).

Mr. Quinn testified when he and Mr. Whittaker returned on Sunday evening, the car was missing and Mr. Whittaker called the police (A-543). He stated Mr. Whittaker was without transportation for up to one month as a result of the car being stolen (A-543). Mr. Quinn indicated he was the one who would have to taxi Mr. Whittaker around (A-544). Mr. Quinn confirmed Mr. Whittaker's excellent reputation in

the community as a truthful, law-abiding, honest and peaceful person (A-544, A-545).

Wayne Whittaker then testified (A-548). Mr. Whittaker indicated he was working for a mortgage company and also owned a deli, which was like a Mom and Pop-type of store in Norristown during pertinent times (A-559, A-550). Mr. Whittaker indicated he was working as a loan officer for a mortgage company in the spring of 1999 (A-551). Mr. Whittaker indicated he currently is employed as a Manager for Wawa (A-553).

Mr. Whittaker testified he purchased a black JEEP Grand Cherokee in 1997 in a lease arrangement (A-553). Mr. Whittaker indicated he had problems with the tires on the car on a number of occasions (A-554). Mr. Whittaker indicated around the end of May to the beginning of June of 1999, he was two months in arrears with the finance company in reference to his car payments (A-555). He indicated he would speak to representatives of the finance company and sometimes the conversations were nasty and rude (A-556). Mr. Whittaker indicated he wanted to purchase the vehicle and wanted to get a pay off figure (A-556). He indicated the reason he wanted to purchase the vehicle was to do a five-year purchase and get a cheaper monthly payment (A-556). Mr. Whittaker indicated he did not purchase the car since World Omni wanted $29,000.00, which he thought was too high (A-557).

Mr. Whittaker indicated the week his car was stolen he was rear-ended by Mrs. Pepper of the Horticultural Society (A-559, A-560). He indicated on June 3, 1999, he stopped by Golden Chrysler Car Dealership and obtained an oral estimate for the repair of the car (A-560, A-561).

Mr. Whittaker confirmed he spoke to World Omni in June of 1999 and promised to pay the two months because he was going to be getting money from a mortgage settlement (A-560).

Mr. Whittaker indicated on June 4th he parked his car on Queen Street in Philadelphia (A-564). Mr. Whittaker indicated there were no set parking spots on Queen Street and many times one would have to drive around up to 45 minutes looking for a parking spot (A-564). Mr. Whittaker indicated he did not have a garage on Queen Street (A-564).

Mr. Whittaker indicated he parked the car and went to the New Jersey shore with Mr. Quinn (A-565). He indicated everything was locked in the car and sealed and the Club was on the steering wheel (A-565). Mr. Whittaker indicated no keys were left in the car and he had his keys with him (A-566).

Mr. Whittaker indicated when he returned on Sunday evening and found the car missing, he telephoned the police and spoke to a police officer that evening (A-566, A-567). Mr. Whittaker indicated the next day he then spoke to the insurance company about the theft (A-568). Mr. Whittaker stated he told the insurance company the status of his car payments and the status of the keys (A-568, A-569). Mr. Whittaker indicated he had the keys until he and Mr. Quinn moved recently and then the keys were thrown out (A-569). Mr. Whittaker testified as a result of the theft of the car, he still owes World Omni approximately $2,000.00 and has been unable to pay them at this point (A-570). Mr. Whittaker indicated that after the car was stolen, he had trouble with transportation.

Mr. Whittaker stated in April of 1999 he had received two calls from a person at his store in Norristown (A-571 – A-573). Mr. Whittaker indicated he did not know who called him and did not recognize the voice (A-573). He testified the conversation lasted less than one minute (A-574). Mr. Whittaker indicated after the first conversation, the person hung up (A-575). He stated two or three days later there was a second phone call (A-575, A-576). Mr. Whittaker testified he believed the calls were in the beginning of April of 1999 (A-576). Mr. Whittaker testified that during the second conversation, he told the person that he didn't think he wanted the car taken, and the person on the other end hung up (A-578).

Mr. Whittaker indicated after the two conversations in April of 1999 and June 4 of 1999, he never heard from the individual again (A-578). Mr. Whittaker indicated he was never told by anyone to leave the car at a specific place or location (A-578, A-579). Mr. Whittaker indicated he felt uneasy about the two conversations, but did not call the police or tell anyone (A-579). He indicated after his car was stolen he did not really think about the calls initially (A-579, A-580).

Mr. Whittaker indicated that the theft of the car hurt him financially and made it difficult for him to get around without a car (A-580). Mr. Whittaker indicated when he contacted the insurance company, he never tried to hide the car payment arrearage (A-583, A-584). Mr. Whittaker stated when the car was parked on June 4, 1999, the car had normal gold wheels (A-584).

Mr. Whittaker told the jury about the rear-end collision on June 2, 1999, and the estimate for $1,300.00 that he received on June 3, 1999 from Golden Chrysler Plymouth for the

damage to the rear of the car (A-588, A-589). Mr. Whittaker testified he had never misled anyone as to the status of the financing of the car (A-589). Mr. Whittaker indicated he cooperated with the insurance company and even offered them the keys (A-589).

Mr. Whittaker testified when he interviewed with the F.B.I. Agents he was stunned and upset since he came down to meet with them thinking he was a car theft victim 9A-591). He indicated that the statement the F.B.I. Agent prepared had never been reviewed by him (A-593) (See Exhibit "D" to the Brief). Mr. Whittaker absolutely and emphatically denied he had anything to do with the theft of the car or any fraud using the mail to collect insurance (A-594). He stated he was innocent of all charges (A-595). On cross-examination, Mr. Whittaker indicated he had told the unidentified man he spoke to by telephone in April the color of the car, but could not remember if he said it was a JEEP Cherokee (A-628). He indicated that he did not tell the person the license number because he would not have known it (A-628). At the conclusion of Mr. Whittaker's testimony the defense rested (A-645).

The government then called Agent McIntosh back on rebuttal (A-649). He denied standing during the interview with Mr. Whittaker (A-649, A-650).

Agent Usleber then testified about the report of seeing Mr. Whittaker's car several days after it was reported stolen (A-651, A-652). The prosecution then rested again (A-652).

Closing speeches were then given. The jury returned with its verdict on November 16, 2001 and found Mr. Whittaker guilty of mail fraud (A-765). As noted, a Motion for

Judgment of Acquittal was then argued extensively (A-767, etc.).

## ARGUMENT

### A. The Court erred in supporting a conviction through negative inferences and speculation from statements.

The Petitioner Mr. Whittaker objects to and criticizes the Third Circuit Court of Appeals' allowance of the use of speculation in affirming the jury conviction when, in fact, there was absolutely no evidence of Mr. Whittaker's involvement.

In essence, Mr. Whittaker parked his car on Friday, June 4th and went to the shore. He returned Sunday evening, June 6th, and found his car missing and immediately reported the theft to the police and then to the insurance company. There was no evidence that Mr. Whittaker knew any of the persons involved with the "chop shop". The only evidence was Mr. Whittaker's statement, which indicated four to six weeks before June 4th, he had received two phone calls about his car being taken. But, during the second conversation, Mr. Whittaker essentially indicated he had changed his mind. There was no testimony or evidence that there was any further contact with Mr. Whittaker and this mysterious person who called.

The majority decision mentioned the key was in the car when it was taken and there was no damage. But, there was no eyewitness as to who took the car. An experienced car thief can break into a car without causing any damage whatsoever. Further, the key that was seen could have been any key. There was no evidence it was the specific key that

Mr. Whittaker had. The key could have been a copy or a pass key, etc. Most importantly, there was no indication that there was any communication setting up the time where the car was to be taken. The majority wrongly speculated that any car thief could easily find the car parked in the Queens Village area in Philadelphia. Judge Becker in his dissent correctly noted that Queen's Village is a large area, and "I have no idea where the majority gets the notion that thieves could scour the area in a matter of minutes." Judge Becker in his dissent also noted on page 14 there were other ways keys could have been obtained and the jury should not have inferred nor should the majority that the presence of a key would be a critical fact.

But, what was particularly upsetting with the majority's opinion is it's drawing of a negative inference from not believing Mr. Whittaker's statement to the Federal Bureau of Investigation. Mr. Whittaker, in a conversation with the F.B.I., admitted to two telephone calls four to six weeks before where there were discussions about taking his car. In the second telephone call, Mr. Whittaker indicated he had lost interest. The majority opinion noted as follows:

> "Whittaker's admission to the F.B.I., described above, is quite condemning. Further, the jury could choose to believe that his story to the F.B.I. was not the entire truth: that he had more than two conversations with the caller or that the telephone calls were different than the way he described them. A jury could have determined that Whittaker told Usleber about the two calls because he realized the F.B.I. may have phone records." (Opinion of the United States Court of Appeals for the Third Circuit, dated May 20, 2003, page 11).

In essence, the majority was allowing a negative inference and negative facts to be drawn from disbelieving Mr. Whittaker in his statements. That is the important and exceptional question and that is the real reason this petition is being requested since that is in conflict with United States Supreme Court decisions.

In the case of *Moore vs. Chesapeake and Ohio Railroad Company*, 340 U.S. 573, 71 Sup. Ct. 428 (U.S., 1951), the United States Supreme Court noted as follows:

> "It is true, it is the jury's function to credit or discredit all or part of the testimony. But, disbelief of the engineer's testimony would not supply a want of proof... nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it." *Id* 430.

Similarly, in the case of *Bose Corporation v. Consumer Union of the United States, Inc.*, 466 U.S. 485, 104 Sup. Ct. 1949 (U.S., 1984), the United States Supreme Court again noted the following:

> "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Id* 1966.

What the majority opinion did was to change the law and to allow negative inferences from the disbelieved statement of Mr. Whittaker. Some of the negative inferences the majority allowed were that there were other conversations that could have set up for the car thief and the jury could have disbelieved Mr. Whittaker that there were only two conversations with no specifics. Based on this use of negative

inferences from not accepting Mr. Whittaker's statement, the majority found unfairly that the conviction was supported by sufficient evidence. Mr. Whittaker contends this violates fundamental due process.

As a result, the Petitioner, Wayne Whittaker, respectfully requests this Honorable Court grant a Petition for Writ of Certiorari to review this issue.

**B. The Court erred in admitting the statements in violation of the corpus delicti rule.**

Mr. Whittaker, the Petitioner, contents that his statement given was improperly admitted since there was no corpus delicti. The majority in the Third Circuit Opinion then used the negative inference from the disbelieved statement of Mr. Whittaker in evidence over a corpus delicti objection. The concept of trustworthiness, as part of the corpus delicti analysis, which was emphasized by the United States Supreme Court was ignored since the majority opinion used the disbelieved statement to draw negative inferences to support the conviction. That use is contrary to the United States Supreme Court decision of *Opper v. United States of America*, 348 U.S. 84, 75 Sup. Ct. 158 (U.S., 1954).

> "The need for corroboration extends beyond a complete and conscious admission of guilty, a strict confession... it is necessary, therefore, to require the government to produce substantial independent evidence that would tend to establish the trustworthiness of the statement." *Id* 163, 164.

The concept was also set forth in the United States Supreme Court case of *Smith v. United States of America*, 348 U.S. 147, 75 Sup. Ct. 194 (U.S., 1954). The Third Circuit

Court of Appeals has adopted that position in *Government of Virgin Islands vs. Harris*, 938 F.2d 401, 410 (3rd Cir., 1991).

> "Applying federal law, we adopt the Trustworthiness Doctrine..." *Id* 410.

By the majority opinions utilizing the negative inference from the statement, the Trustworthiness Doctrine was violated as was the Corpus Delicti Doctrine. There was no independent evidence, yet the majority was taking a negative inference from the statement to support the conviction by filling in the blanks that there had to be other conversations where the misconduct occurred when there was no evidence of such conversations. The inherent lack of trustworthiness violated the corpus delicti rule.

Mr. Whittaker respectfully requests this Honorable Court grant certiorari in the captioned matter.

## CONCLUSION

For the foregoing reasons and in the interest of justice, the Petitioner, Wayne Whittaker, respectfully requests this Honorable Court grant this petition and accept this appeal because of the serious constitutional issues raised by supporting a conviction by negative inferences and speculation from statements and from violation of the corpus delicti rule when there was no inherent trustworthiness.

Respectfully submitted,

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## APPENDIX A

## THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**No. 02-1685**

**[Filed June 26, 2003]**

| | |
|---|---|
| THE UNITED STATES OF AMERICA | ) |
| | ) |
| v. | ) |
| | ) |
| WAYNE WHITAKER, | ) |
| Appellant | ) |
| | ) |

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 01-or-00107)

**SUR PETITION FOR REHEARING**

BEFORE: SCIRICA, Chief Judge,
SLOVITER, NYGAARD, ALITO, ROTH,
MCKEE, RENDELL, BARRY, AMBRO,
FUENTES, SMITH, and BECKER, Circuit Judges[1]

[1] Judge Becker stepped down as Chief Judge and assumed senior status on May 4, 2003.

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ _____
United States Circuit Judge

DATE: June 26, 2003

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**No. 02-1685**

**[Argued January 22, 2003, Filed May 20, 2003]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| vs. | ) |
| | ) |
| WAYNE WHITTAKER, | ) |
| Appellant. | ) |
| | ) |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. No. 01-cr-00107)
District Judge: The Honorable Stewart Dalzell

BEFORE: BECKER, Chief Judge, NYGAARD and AMBRO, Circuit Judges.

### JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of

Pennsylvania and was argued by counsel on January 22, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered on March 6, 2002, be, and the same is hereby affirmed.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered on March 6, 2002, be, and the same is hereby affirmed.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ _____

Acting Clerk

Date: May 20, 2003

**Certified as a true copy and issued in lieu of a formal mandate on July 7, 2003.**

**Teste: /s/ _____**

**Clerk, U.S. Court of Appeals**
**For the Third Circuit.**

## APPENDIX C

## UNITED STATES COURT OF APPEALS
## FOR THE THIRD CIRCUIT

**No. 02-1685**

**[Argued January 22, 2003,**
**Filed May 20, 2003]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| vs. | ) |
| | ) |
| WAYNE WHITTAKER, | ) |
| Appellant. | ) |
| | ) |

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. No. 01-cr-00107)
District Judge: The Honorable Stewart Dalzell

BEFORE: BECKER, Chief Judge, NYGAARD and AMBRO,
Circuit Judges.

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## OPINION OF THE COURT

NYGAARD, Circuit Judge.

In this case, Appellant Wayne Whittaker claimed that his car was stolen without his knowledge or consent. The FBI presented evidence that he had taken part in an "insurance give-up" scheme. We are required to determine whether the evidence used to convict Whittaker of mail fraud is sufficient. Whittaker makes two arguments. First, he contends that the District Court violated the corpus delicti rule by allowing the Government to use several statements that he made to the FBI. Second, he asserts that the District Court erred by not granting a judgment of acquittal because the evidence was insufficient to support the verdict. After analyzing the relevant case law and scouring the record, we reject both arguments, and affirm.

### I.

A rash of automobile thefts in Philadelphia in the early 1990s prompted the FBI to set up a stolen car task force. The task force uncovered a secret location in the city where a theft ring maintained a "chop shop" known as the "Hacienda." A chop shop is a place where stolen cars are disassembled and sold, piece-by-piece, to often complicit repair and body shops. Like social security numbers, every vehicle has a different vehicle identification number ("VIN"), which is affixed to various parts of the vehicle. Once separated from

the chassis, the vehicle parts do not carry VINs, or their VINs are removed, so the parts can no longer be identified.

An FBI informant working in the Hacienda gave the FBI information about the car thefts that passed through the chop shop, including "insurance give-ups." An insurance give-up is a vehicle that is turned in to the chop shop by or on behalf of someone trying to collect insurance money by reporting the vehicle stolen. Both parties benefit from this scheme: the vehicle owner gets insurance money and out of any lease payments, and the car thief gets a car.

Appellant's 1998 Jeep Cherokee, identified by its VIN plates, was delivered to the chop shop. At the time of its arrival, there was evidence that the car was an insurance give-up: testimony showed that there was no damage to the steering column, door locks, or windows, and that the key was in the ignition.

During a subsequent interview with the FBI about the car theft, Whittaker admitted that he had participated in two phone conversations with an individual who offered to "get rid of" his vehicle as an insurance give-up. Whittaker told the FBI that, during the second phone call, he informed the caller that he was not sure he wanted to go through with the scheme. He did not tell the man not to take his car.

The Government prosecuted Whittaker, and a jury found him guilty of one count of mail fraud, 18 U.S.C. § 1341. Whittaker moved for a judgment of acquittal, but the District Court denied the motion. Whittaker's motion for reconsideration was also denied and he was sentenced to five years probation, six months of home detention, and restitution

of $26,543. He timely filed a notice of appeal. The District Court had jurisdiction of the violation of 18 U.S.C. § 1341 under 18 U.S.C. § 3231, and we have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

## II.

Because the District Court's decision regarding the admissibility of Appellant's statements following an objection on corpus delicti grounds is one of law, our review is plenary. *United States v. Serafini*, 233 F.3d 758, 768 n.14 (3d Cir. 2000).

### A.

The Supreme Court has held that in order to sustain a conviction based upon a confession or admission on the part of the defendant, the statement of the defendant must be corroborated by some evidence of the corpus delicti ("the body of the offense" or the "essence of the crime"). *Opper v. United States*, 348 U.S. 84, 93, 99 L. Ed. 101, 75 S. Ct. 158 (1954).[1] The purpose of the corpus delicti doctrine is to prevent convictions of criminal defendants based solely upon

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[1] Although the discussion of the corpus delicti doctrine pertains to the admissibility of evidence, not the sufficiency of evidence to convict, *Government of the Virgin Islands v. Harris*, 938 F.2d 401, 409 (3d Cir. 1991), our analysis of both the corpus delicti doctrine and the legal sufficiency of the evidence necessarily overlap. *See, e.g., United States ex rel. Hayward v. Johnson*, 508 F.2d 322, 330 (3d Cir. 1975) (holding that several pieces of circumstantial evidence "both satisfy the corpus delicti rule and provide sufficient evidence for the jury . . . .").

untrue confessions. *Warszower v. United States*, 312 U.S. 342, 347, 85 L. Ed. 876, 61 S. Ct. 603 (1941). According to the corpus delicti "trustworthiness" principle, confessions and admissions must be corroborated by "substantial independent evidence which would tend to establish the trustworthiness of the statement." *Id.*; *United States v. Wilson*, 436 F.2d 122, 123 (3d Cir. 1971).

In a corpus delicti analysis, sufficient evidence establishing the trustworthiness of the statements at issue is the critical consideration. *Government of the Virgin Islands v. Harris*, 938 F.2d 401, 408 (3d Cir. 1991). In order to establish corpus delicti, the Government need prove only that a crime has been committed; identifying the defendant as the perpetrator of the crime is not required. *Id.* Finally, the confession can prove itself trustworthy if it discloses facts that were unknown to anyone other than the criminal. *Id.* at 403; *Wilson*, 436 F.2d at 123.[2]

**B.**

The admissions at issue took place with FBI Special Agent Jennifer Usleber. When Usleber confronted Whittaker with evidence of an insurance give-up, he seemed "visibly nervous." App. 406. He then admitted that an unknown caller called him and said, "I understand you have something you want to get rid of." App. 409. When he asked the caller to clarify, the caller said, "your vehicle," and then, "We can

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[2] The requirement that the corpus delicti be established by evidence independent of a confession is different from the requirement that there be independent evidence establishing the truthfulness of the confession.

make it disappear. " App. 410. Whittaker admitted that he listened to the caller's proposition, and provided the caller with details about his car: the make, model, color, license number, and where it would be parked. App. 411-12. After Whittaker asked the caller what more he needed to do, the caller replied, "Nothing." App. 412. In response to Usleber's asking Whittaker what he thought would happen after this call, Whittaker said that he figured his car would be taken, and that he would be able to get out from under the lease. App. 412. Whittaker also described a second phone call during which he told the caller he had second thoughts. App. 415. But he admitted to Usleber that he did not tell the man not to take his car, and he did not do anything, such as park his car in a different location, that would have prevented it from being stolen. *Id.*

C.

Whittaker asserts that his conviction is based on this confession to the FBI agent, and that these statements are not corroborated by substantial independent evidence which would tend to establish the trustworthiness of the confession. This argument fails, for we conclude that there is sufficient evidence to establish the trustworthiness of Appellant's statements to the FBI.

William Stauffer, the informant working in the Hacienda, testified that when he first entered Whittaker's black Jeep Cherokee, the keys were in the ignition and there was no damage to the steering column, doors, or windows. App. 219-21. Frank Ozga, the operator of the Hacienda, also testified that he was provided with keys to the Jeep, and that there was no damage to the steering column, doors, or windows. App.

148. Whittaker testified that he not only locked the car, but that he also used The Club™; to lock the steering wheel, and activated the car alarm. A jury could have believed the testimony of Stauffer and Ozga, and disbelieved Whittaker's testimony that he left his Jeep, locked, alarmed, and Clubbed, and that he was the only person who had keys to it. App. 298, 310, 327.

Whittaker told Police Officer Rivera, who took the initial stolen vehicle report, that he left his Jeep parked on the street on a Friday, and returned Sunday night to find it stolen. Ozga testified that he would instruct the person surrendering the vehicle not to report the vehicle stolen for "three days to a week" to give him time. App. 91-92. A jury could have drawn an inference from Whittaker's three-day trip that this instruction had been communicated to him.

When Officer Rivera took the initial report from Whittaker, Whittaker told him that there were no financial arrearages on the vehicle. App. 299. Not only were there financial arrearages on the Jeep Cherokee, but Whittaker was especially anxious about those arrearages. According to a Collection Department Supervisor at World Omni Financial Corporation ("the leasing company"), in April and May, after a World Omni customer account representative told Whittaker that he was significantly behind on his payments, the representative had discussions with Whittaker about the options of his voluntary surrender of the Jeep or the refinancing of the vehicle. App. 389. Whittaker was told that, had he elected to surrender his vehicle voluntarily to World Omni, the leasing company would take possession of the vehicle, sell it at auction, and pursue Whittaker for any

outstanding balance still owing.[3] Because of an accident that Whittaker had been in four days before the Jeep was reported stolen, which required repairs of an estimated $1,300, App. 349, this outstanding balance would have been even greater. Whittaker testified he was not making his payments at the time because he "didn't have the money." App. 562. In addition, Whittaker was told by World Omni that a voluntary surrender of the Jeep would have a negative effect on his credit file. App. 614. We conclude that a jury could have inferred an insurance give-up motive from Whittaker's automotive financial dire straits. A jury could have also decided that Whittaker lied to the police officer about his arrearages in order to cover up his crime.

Other important circumstantial evidence against Whittaker includes testimony by Ozga that he was contacted by Leonard DeWolfson, Sr. (for whom Ozga had done "insurance jobs" in the past), who said that he had a black Jeep Cherokee insurance job which he wanted to pass to the Hacienda. App. 93-94.[4] Also, Michael Dyke, who is Ozga's stepson and who worked for Ozga in the Hacienda, corroborated Ozga's testimony that the Jeep was an "insurance job" and that the DeWolfsons provided the keys with the car. App. 175-76.

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[3] Whittaker testified at trial that World Omni wanted to charge him $29,000 for his Jeep Cherokee, which only had a book value of between $19,000 and $21,000. App. 557.

[4] This testimony was enhanced by Ozga's details, such as that he "negotiated" with DeWolfson, that DeWolfson's son dropped off the Jeep, and that he had paid the DeWolfsons $300. App. 95-96.

Whittaker argues that because one would have to drive around for "forty or more minutes" looking for a parking spot in his Philadelphia neighborhood, it would never be possible to tell anyone with any certainty where he would park his car with regularity. App. 564. This argument overstates the car thief's task: the thief could easily cover the neighborhood looking for a particular car in a matter of minutes.

Finally, the nature of Whittaker's statements doom his argument. If the confession itself discloses facts that were unknown to anyone other than the criminal, the confession can prove itself trustworthy. *Harris*, 938 F.2d at 403. In *Harris*, an appeal from a conviction for first-degree murder where no body was recovered, the defendant argued that the evidence obtained independent of his confession did not satisfy the trustworthiness doctrine. *Id.* In affirming the conviction, we held that as long as the evidence was substantial and proved trustworthy, the doctrine was satisfied. *Id.* at 410. We stated that this could be done in any number of ways, most notably by the detailed confession itself, if it demonstrated knowledge unknown to anyone other than the criminal. *Id.* In affirming the conviction, we held as sufficient evidence that the victim and the defendant had displayed acts of violence toward each other and that the victim had sought to avoid the defendant for fear of her life. *Id.* at 417-18. Essentially, we held that even in homicide cases, where no body or murder weapon has been recovered, a defendant's statements concerning how the killing was carried out, corroborated by circumstantial evidence that there was a homicide, support the admissibility of those statements. In this case, Whittaker's statements about this contact with the car thief disclosed the way in which the insurance give-up scheme operates: the individual who wants an insurance job is

contacted, and asked for a description of the car, the license plate number, and where it would be parked. Therefore, Appellant's statements about his contact with a man who identified himself as a car thief for "insurance jobs," corroborated by circumstantial evidence that there was an insurance job, support the admissibility of those statements.

In sum, because the record evidence is sufficient to establish the trustworthiness of Whittaker's statements and satisfy the requirements of the corpus delicti doctrine, the statements are admissible.

## III.

When reviewing a district court's decision regarding sufficiency of the evidence, we apply "a particularly deferential standard of review when deciding whether a jury verdict rests on legally sufficient evidence. . . . We must view the evidence in the light most favorable to the government, and will sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998) (citations omitted). After scouring the record, we conclude that there was more than sufficient evidence that Whittaker gave up his Jeep Cherokee as part of an insurance fraud scheme.

To convict Whittaker of mail fraud, the Government had to establish (1) his knowing and willful participation in a scheme to defraud, (2) with the specific intent to defraud, and (3) the use of the mail or interstate wire communications in furtherance of the scheme. *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001).

Whittaker's admission to the FBI, described above, is quite condemning. Further, the jury could choose to believe that his story to the FBI was not the entire truth: that he had more than two conversations with the caller, or that the telephone calls were different than the way he described them. The jury could have determined that Whittaker told Usleber about the two calls because he realized that the FBI might have phone records. *See United States v. Voigt*, 89 F.3d 1050, 1090-91 (3d Cir. 1996) (stressing that the jury may reject the defendant's proffered interpretation and accept the government's, and that we draw all reasonable inferences in favor of the jury's verdict).

Whittaker testified that he never told any friends, family members, or the insurance company about the calls. App. 580-81. The calls "didn't stick into [his] mind," and after his Jeep was stolen, the calls "didn't really pop into [his] mind" until a month later. *Id.*

Whittaker asserts that because of a discrepancy between the date of the mailing in the indictment and the evidence presented at trial concerning the actual date of mailing, the government "failed to prove what it alleged in the complaint." This argument is meritless because time is not an essential element of mail fraud, and proof of the acts charged, before the indictment and within the statute of limitations, is normally sufficient. *United States v. Somers*, 496 F.2d 723, 745 (3d Cir. 1974). This variance did not deprive Whittaker of due process because he was sufficiently apprised of the charge against him such that he was not prevented from mounting a stronger or different defense. *See United States v. Crocker*, 568 F.2d 1049, 1059 (3d Cir. 1977).

We conclude that the Government's evidence is sufficient for a conviction, and that the jury did not base its verdict on mere speculation. Whittaker's admissions concerning the telephone conversations are incriminating; the jury's conclusion that the disappearance of his Jeep flowed from the conversations does not rest merely upon conjecture. Whittaker's financial motivation and his attempts to escape the lease in talks with World Omni provide motive. Finally, evidence shows that the undamaged Jeep arrived at the Hacienda with the key.

**IV.**

For the reasons discussed, we will affirm the District Court.

**DISSENT**

Becker, *Circuit Judge*, dissenting.

The Government is to be congratulated on its successful prosecution of the operators of the "chop shop" known as the "Hacienda." Similar kudos are not warranted with respect to the Government's prosecution of Mr. Whittaker. To be sure, the evidence is clear that Whittaker was in arrears on his lease payments, and would have taken a financial "bath" had the vehicle simply been repossessed; hence he stood to gain by an "insurance give up." Yet mere motive can never be enough to establish guilt, especially in a case such as this one. Rather, there needs to be evidence in the record from which the factfinder could reasonably conclude that there was some complicity between Whittaker and the chop shop operators, or

the thief who took the Jeep to the Hacienda. But there is none.

The Government relies heavily on the fact that Whittaker admitted to an investigating officer that, in response to an inquiry from an anonymous telephone caller who likely had access to Whittaker's lease payment record, he gave the caller certain information that might suggest complicity. But there is nothing in the record to suggest that Whittaker was lying when he told the same officer that during a second call from the anonymous man, he got "cold feet," and did not agree to a "give-up." In his trial testimony, Whittaker denied complicity, and adduced evidence that the Jeep was locked and "clubbed," and parked at different locations in Queen Village, where we can judicially notice that parking is "hen's teeth" scarce. Queen Village is a large neighborhood, and I have no idea where the majority gets the notion that the thieves could scour the area in a matter of minutes; Whittaker testified that it could take 30-45 minutes to find parking, which seems correct to this writer.

I acknowledge that Whittaker's statements during the investigation were not entirely consistent. But they do not, in my view, establish such consciousness of guilt as to save the Government's case. Whittaker had no reason to believe that he was a suspect, and the investigation of him was at a nascent stage, and misstatement at that juncture was not criminal.

The linchpin of the Government's case is the car keys. The Government contends that the jury properly inferred complicity from testimony demonstrating that the chop shop had keys to Whittaker's Jeep and that the Jeep was received

at the chop shop in an undamaged condition. These facts are certainly suspicious and may suggest that the Jeep was a "give up." But there is no evidence that the chop shop got the keys from or through Whittaker. Indeed, he testified that he threw them away when he found out that the Jeep had been stolen. I do not believe that a reasonable jury could infer that Whittaker had turned over his keys to the thieves simply from the fact that the chop shop possessed the keys. For example, a copy of the keys could have been made using a mold of the lock. In short, the government was not able to link Whittaker's actions to the fact that the chop shop had the keys. Moreover, there was evidence in the record that a "virtuoso" car thief could steal even a locked vehicle without damaging it.[5]

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[5] I note that the majority states that:

> Other important circumstantial evidence against Appellant includes testimony by Ozga that he was contacted by Leonard DeWolfson, Sr., for whom Ozga had done "insurance jobs" in the past, who said that he had a black Jeep Cherokee insurance job of which he wanted to dispose. Also, Michael Dyke, who is Ozga's stepson and who worked for Ozga in the Hacienda, corroborated Ozga's testimony that the Jeep was an "insurance job" and that the DeWolfsons provided the keys with the car.

I fail to see how this "important circumstantial evidence" helps establish the necessary linkage that DeWolfson was the car thief, since there is no indication that DeWolfson had personal contact with Whittaker. There is no evidence as to how DeWolfson got the keys and Dyke's "corroboration" is purely conclusory and lacks evidentiary support.

There is certainly suspicion that Whittaker was involved. There might even be enough to convict him if the standard of proof were a fair preponderance of the evidence. But the Government has prosecuted Whittaker for a crime, and the standard is proof beyond a reasonable doubt. On the evidence that I have described, that standard is simply not met. In my view, the conviction should be set aside, hence I respectfully dissent.[6]

TO THE CLERK:

Please file the foregoing opinion.

/s/ _____
Richard L. Nygaard
Circuit Judge

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[6] I need not address the corpus delicti issue since I would reverse the conviction based on the fact that there was insufficient evidence to sustain a conviction. However, I do believe that the majority conflates the discussion of corpus delicti with the discussion of legal sufficiency.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No. 02-1685**

**[Argued January 22, 2003,**
**Filed May 20, 2003]**

| | |
|---|---|
| UNITED STATES OF AMERICA, | ) |
| | ) |
| vs. | ) |
| | ) |
| WAYNE WHITTAKER, | ) |
| Appellant. | ) |
| | ) |

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. No. 01-cr-00107)
District Judge: The Honorable Stewart Dalzell

BEFORE: BECKER, Chief Judge, NYGAARD and AMBRO, Circuit Judges.

**JUDGMENT**

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 22, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered on March 6, 2002, be, and the same is hereby affirmed.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ _____

Acting Clerk

Date: May 20, 2003

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**CRIMINAL ACTION NO. 01-107**

**[Filed December 7, 2001]**

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|---|---|
| UNITED STATES OF AMERICA | ) |
| | ) |
| v. | ) |
| | ) |
| WAYNE WHITTAKER | ) |
| | ) |

**MEMORANDUM**

Dalzell, J. December 7, 2001

Wayne Whittaker was on November 16, 2001 convicted of one count of mail fraud, in violation of 18 U.S.C. § 1341. After the jury's verdict that day, Whittaker renewed his motion under Fed. R. Crim. P. 29 for judgment of acquittal, and after argument on the point, and acknowledging that the question was very close, we nevertheless denied the motion.

Whittaker has now filed a motion for reconsideration of that denial, which has occasioned a round of formal briefing and then, pursuant to our Order of November 27, 2001, the submission of supplemental memoranda. Because the issue is

one upon which reasonable minds can differ, we here canvass at some length why we adhere to our November 16 ruling.

Legal Standards

Defendants who challenge the sufficiency of a jury verdict face a high hurdle. As our Court of Appeals summarized the jurisprudence a few days ago in *United States v. Sean Hart*, 273 F.3d 363, 2001 U.S. App. LEXIS 25367 (3d Cir. 2001):

> Our review of the sufficiency of the evidence after a conviction is "highly deferential." *See United States v. Helbling*, 209 F.3d 226, 238 (3d Cir. 2000), *cert. denied*, 531 U.S. 1100, 148 L. Ed. 2d 715, 121 S. Ct. 833 (2001). We must determine whether the evidence submitted at trial, "when viewed in the light most favorable to the government, would allow a rational trier of fact to convict." *Id.; United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (holding that the court must determine "whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let the jury find him guilty beyond a reasonable doubt.").

Slip op. at 8.

The day before our Court of Appeals decided Hart, it also had occasion to summarize the jurisprudence of mail and wire fraud in *United States v. Frank Antico*, 275 F.3d 245, 2001 U.S. App. LEXIS 25318 (3d Cir. 2001):

> To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt (1) that

> defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme.

Slip. op. at 23, *citing United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984).

In essence, Whittaker contends that, even viewed in a light most favorable to the Government, the evidence at his trial failed to prove beyond a reasonable doubt his "knowing and willful participation in a scheme or artifice to defraud." We therefore must examine the trial's evidence in some detail.

The Government's Case Against Whittaker

Whittaker's name came to the attention of the Government during its protracted investigation of widespread "chop-shop" operations in Philadelphia. This investigation eventually produced the cooperation of at least three criminals engaged in this unedifying business, most notably one Frank Ozga who ran such an operation through the fronts of two shops he owned, A-OK Auto Parts and Frankford Auto Salvage. Ozga's identity was brought to light through the cooperation of a young man named William Stauffer, who was on Ozga's payroll from 1994 through 1998. Stauffer regularly worked at a building Ozga had in the Kensington section of Philadelphia that the parties referred to as the "Hacienda", where the stolen cars were on a large scale "chopped", that is to say, taken apart to supply parts to buyers who ordered them in this black market.

Another worker at A-OK from 1992 through 1999 was Michael Dyke, who also testified at Whittaker's trial. Dyke was present when professional car thieves, Len DeWoolfson and his son, Len, Jr., delivered a black Jeep Cherokee. The DeWoolfson pere and fils were paid a "couple hundred dollars" for this service.

While the Government never contended that Whittaker had anything to do with the sordid business of chopping or ever associated with criminals like Ozga, Stauffer or Dyke, Whittaker's black Jeep Cherokee found its way to the Hacienda by June 11, 1999, a fact that Stauffer reported to the FBI the following Monday, June 14, 1999. Stauffer peeled the mylar identification strip off the Jeep, thereby producing indubitable evidence that this was indeed Whittaker's car.

All three of this criminal trio testified that the condition of the Jeep Cherokee was consistent with an "insurance give-up", that is, where the owner or lessor of a car affirmatively assists in the theft of the insured vehicle in order to get insurance money. The indicia of such give-ups are in essence that there is little damage to the car and keys are present in the ignition. By contrast, vehicles subject to the crude act of raw auto theft typically have broken steering columns, shattered windows and other significant damage.

By the Government's own description, Whittaker was a "little fish"[1] who became interested in the possibility of an insurance give-up when he fell behind in his lease payments

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[1] In the Government's closing, after describing its criminal trio as "big fish", the prosecutor said, "I'll admit Wayne Whittaker is a little fish."

on the Jeep to World Omni Financial Corporation, then of Bridgeton, Missouri. After Whittaker on June 6, 1999 contacted the Philadelphia Police Department and reported that his 1998 Jeep Cherokee had been stolen, he made a similar report to his insurer, Colonial Penn Insurance Company. In the summer of 1999, the insurer ultimately remitted $25,664.50 to World Omni Financial, to cover all but $3,000 of the capitalized lease balance on Whittaker's Jeep.

Besides this evidence of motive and aspects of insurance give-ups, the Government's only proof that Whittaker engaged in a scheme or artifice to defraud, within the meaning of the mail fraud statute, came out of Whittaker's own mouth. Whittaker met with two FBI agents on May 10, 2000, and was interviewed for about forty-five minutes. While there are, in the Government's case alone, no less than four versions as to what Whittaker actually said,[2] the most incriminating came from the trial testimony of Special Agent Jennifer Usleber, who conducted the May, 2000 interview.

According to Special Agent Usleber, about mid-way through the interview Whittaker admitted receiving an unsolicited phone call in April of 1999 from an unidentified individual who said he could help resolve Whittaker's financial problems with his car. According to the Special Agent, Whittaker admitted that he gave the caller information about the make and model of his car, and where he lived. She reported that Whittaker also disclosed a second call, a few

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[2] *See* our opinion denying Whittaker's motion to suppress, *United States v. Whittaker*, 2001 U.S. Dist. LEXIS 7439, Cr. No. 01-107, 2001 WL 632916 (E.D.Pa., June 5, 2001).

days later, where Whittaker again spoke briefly with the unidentified caller, who claimed he would take care of Whittaker's problem by making it "disappear".

Although this most incriminating evidence refers to two conversations in April of 1999, the evidence showed that the car in fact disappeared during the weekend of June 4-6, 1999. Billy Stauffer testified that he saw the Jeep Cherokee at the Hacienda on June 11, 1999, still intact.

Viewed in a light most favorable to the Government, there was therefore at least a period of five weeks -- that is, from April 30, 1999 until June 4, 1999 -- when the car was not stolen, notwithstanding the April conversations. The Government never called either Len DeWoolfson to testify, and never identified Whittaker's caller.[3]

The Parties' Contentions

In its brief in opposition to Whittaker's motion for reconsideration, the Government contends that:

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[3] The Government was also inattentive to other details pertaining to the liberty of this "little fish". Although the Indictment charged that the requisite mailing took place "on or about September 10, 1999," the insurer's representative testified that the check was in fact mailed on July 27, 1999. *See* Gov't Ex. 15. In denying Whittaker's Rule 29 motion, we held that, although not free from doubt, this discrepancy did not undermine the Indictment's legitimacy because it put Whittaker on notice that it was Colonial Penn's mailing at issue. It is also clear that Whittaker suffered no prejudice in his defense because of the Government's inexact pleading.

> Additionally, any reasonable juror could have concluded based upon the motive and other evidence presented, that the defendant was even more directly involved in the jeep [sic] arriving at the chop shop, than simply having the two alleged telephone conversations with a stranger.

Gov't. Mem. at 7.

As this contention constitutes the crux of the Government's argument, we ordered the parties to submit detailed views on whether such a conclusion would constitute a permissible reasonable inference based on the evidence or impermissible speculation. We so directed because it is undisputed that there was no evidence of any contact between Whittaker and the stranger after April of 1999. This lack of evidence is significant because the Government never contradicted Whittaker's testimony that he parked his car on the street and that in Whittaker's neighborhood (Queen Village) he never knew from day to day where he would park his car.

In his supplemental memorandum, Whittaker argues that:

> What flows here is that Mr. Whittaker at one point may have been receptive to the taking of the car during the first telephone conversation in April of 1999. During the second telephone conversation Mr. Whittaker appeared to have a change of heart, although assuming for the sake of the argument the jury did not believe there was an abandonment, we will assume for the sake of argument that Mr. Whittaker still wished the car to be taken. But, the gap

> in proof is that no one has proven that his car was taken by the unidentified person or his co-conspirators. The gap is because the car could have been taken by anyone in Philadelphia.

Def.'s Sup. Mem. at 3.

Conceding that Whittaker had the motive and the temptation in April of 1999 to have the car stolen, his counsel contends that:

> Whatever motive Mr. Whittaker may have had about having the car taken and whatever desires he may have had that the car be taken and whatever hopes he may have had that the scheme of the unidentified caller would succeed, there was not one iota or scintilla of evidence that the person who took the car was connected to Mr. Whittaker's phone conversations with the unidentified caller. Mr. Whittaker cannot be held responsible if an unrelated, intervening third party who had no relationship to the unidentified caller took the car.

*Id.* at 7. Whittaker therefore concludes "that the verdict is based on impermissible guesswork and speculation by the jury" and that "the evidence of the earlier conversation does not support the contention that the car was stolen by the persons involved." *Id.* at 8.

In its supplemental memorandum, the Government responds by stressing again its strong evidence of the presence of an insurance give-up and Whittaker's financially

embarrassed state in the spring of 1999.[4] See Gov't.'s Sup. Mem. at 7, 9. It even goes so far as to suggest that "the evidence supports the determination that Whittaker actually handed over the keys to his jeep [sic]." *Id.* at 2.

Analysis

As we observed during the oral argument on November 16, if Whittaker had from April 30 left his keys in the Jeep's ignition in the hope each night that his thief-tempter would make his car and his financial problems "disappear",[5] it would involve a species of miracle for the car to survive untaken until June 4. We suspect that no one familiar with

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[4] In addition to citing the testimony about the Jeep's condition demonstrating the existence of an insurance give-up, the Government in its memoranda puts great stock in its powerful proof of Whitaker's motive to defraud his insurance company. But this undoubted evidence of financial distress at once proves too much and too little.

It proves too much because of the reality that overextending oneself is a familiar part of the American way of economic life. On the Government's theory, the millions who file consumer bankruptcies presumably all become mail fraud suspects.

History shows why motive evidence also proves too little. When Henry II spoke aloud the complaint, "Not one will deliver me from this low-born priest!", even his enemies did not think that outburst made him the author of a scheme for four knights to draw their swords and cleave Thomas Becket's head at Vespers in Canterbury Cathedral that infamous December 29.

[5] Whittaker's reported euphemism.

urban life in America, or just with life in downtown Philadelphia, would expect such a car to see sunrise the next day in the same place it was left the night before.

As the Government tacitly conceded in its initial brief, these realities required that for the jury to convict Whittaker, it must have concluded that he did more "than simply having the two alleged conversations with a stranger." Gov't Mem. at 7. Specifically, those realities compel an inference that Whittaker remained in contact with the thief-tempter, e.g., to let him know on June 4 where Whittaker had parked the car. Does the imagination this inference requires take the jury into the realm of impermissible speculation?

At one level, it most assuredly does. At a minimum, the jury would have to surmise that the thief-tempter had left, say, a pager number so that Whittaker could contact him, or, absent such knowledge, that the caller happened to ring Whittaker on June 4. Without some contact on June 4, the thief-tempter simply could not have known where the car would be. No city dweller can tell five minutes in advance, much less five weeks in advance, where he will park his car on the downtown streets.

It is important here to note that Whittaker, who elected to testify, never disputed that he had the two conversations Special Agent Usleber reported. While, to be sure, he took sharp issue with the Special Agent's characterization of exactly what he admitted about the content of those two conversations, he never denied that they in fact took place. He did deny, on direct examination, that he had any further contact with the caller. What Whittaker in effect asks us to do

here is to hold the jury to his word that he had only two conversations, and no more.

After careful reflection, we conclude that the jury was not so limited. That is to say, it being undisputed that there were two conversations, the jury was free to infer that those communications did not constitute the only contacts Whittaker ever had with the unknown caller. The jury could therefore legitimately infer that Whittaker had the kind of later conversation(s) that would be needed to carry out what the thief-tempter first proposed in April.

We recognize that we come uncomfortably close to permitting the conviction of a man exclusively on his words and the negative inferences taken therefrom. As Judge Learned Hand put it almost half a century ago, "while a jury may be permitted to draw negative inferences from disbelieved testimony, a case cannot go to a jury solely on that basis." *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952). *Accord Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) ("Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion", *citing Moore v. Chesapeake Ohio R. Co.*, 340 U.S. 573, 575, 95 L. Ed. 547, 71 S. Ct. 428 (1951)).

Although this is, as previously noted, a case on the razor's edge, given the "highly deferential" standard in this procedural context, cited *supra*, the scale of permissible inference tips in favor of the Government and against Whittaker.

*District Court Memorandum and Order - 12/7/01*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**CRIMINAL ACTION NO. 01-107**

**[Filed December 7, 2001]**

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|---|---|
| UNITED STATES OF AMERICA | ) |
| | ) |
| v. | ) |
| | ) |
| WAYNE WHITTAKER | ) |
| | ) |

**ORDER**

AND NOW, this 7th day of December 2001, upon consideration of defendant's motion for reconsideration, the briefs and supplemental memoranda submitted in support and opposition thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that defendant's motion is DENIED.

BY THE COURT:

/s/ _____
Stewart Dalzell, J.